

BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD
WESTERN WASHINGTON REGION
STATE OF WASHINGTON

OLYMPIANS FOR SMART DEVELOPMENT
& LIVABLE NEIGHBORHOODS,
OLYMPIANS OPPOSING MISSING MIDDLE,
JUDITH BARDIN, JOHN TOBIN, WALTER
JORGENSEN, JAMES ELDER, JIM KEOGH,
SHARON GOULET, ANNE VAN
SWERINGEN, BEVERLY BASSETT, SUSI
O'BRYAN, BOB JACOBS, and ERIC
SWANSTROM,

Petitioners,

v.

CITY OF OLYMPIA,

Respondent.

CASE No. 19-2-0002c

**ORDER DENYING MOTION TO
DISMISS, ALLOWING
SUPPLEMENTATION OF THE
RECORD, GRANTING SUMMARY
JUDGMENT, AND DEFERRING
CONSIDERATION OF INVALIDITY**

This matter comes before the Board pursuant to motions for summary judgment and to supplement the record from the Olympians for Smart Development & Livable Neighborhoods (Olympians or Petitioners) and a motion to dismiss SEPA claims from the City of Olympia (City). Briefs considered by the Board related to these motions are listed in Appendix A.

BACKGROUND

This case involves a challenge of Ordinance 7160, which increased the allowed density of properties throughout the City. In 2014, the City completed its RCW 36.70A.130 periodic update of its comprehensive plan and also published a Supplemental Environmental Impact Statement (SEIS) related to that update. One of the significant

1 features of the update was that it established goals and policies advocating increasing
2 densities within a significant portion of the residential zones throughout the City. Ordinance
3 7160 implements those goals and policies through the adoption of development regulations.
4 Prior to adoption of the challenged ordinance, the City submitted a Determination of
5 Nonsignificance (DNS) for the legislative proposal which became the challenged ordinance.¹
6 The DNS referenced a standard SEPA Checklist.² It is the City's issuance of the DNS, as
7 opposed to the preparation of an Environmental Impact Statement (EIS) that is challenged
8 and is now subject to the Motion to Dismiss filed by the City as well as a Motion for
9 Summary Judgment filed by the Olympians. The specific Legal Issue (the SEPA issue) is
10 framed as follows:
11

- 12 1. Did the City violate RCW 43.21C.030 (requiring an EIS to accompany "every
13 recommendation or report on proposals for legislation and other major actions
14 significantly affecting the quality of the environment") and WAC 365-196-620 by
15 failing to prepare an environmental impact statement to inform the Planning
16 Commission and City Council as they deliberated on and made
17 recommendations and decisions on the proposed legislation that became
Ordinance No. 7160?

18 **RESPONDENT'S MOTION TO DISMISS**

19 The City of Olympia has moved to dismiss the SEPA issue basing its argument on
20 the Petitioners' failure to establish standing under RCW 43.21C.075. More specifically, the
21 City argues that the Petitioners have failed to establish standing under the two-part
22 "Trepanier" test: 1) the alleged endangered interest must fall within the zone of interests
23 protected by SEPA, and 2) the party must allege an injury in fact. The entirety of the City's
24 argument is focused on the "Trepanier" test and fails to address standing under the Growth
25 Management Act (GMA). An additional argument put forth by the City is that only four of the
26 Petitioners administratively appealed the City's Hearing Examiner decision, a decision which
27 upheld the City's issuance of the DNS.
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29 The City's argument fails to address standing under the GMA in regards to SEPA
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32 ¹ AR 328.

² AR 322.

1 claims. The Western Washington Growth Management Hearings Board, and now the
2 Western Washington Region of the GMHB, have consistently rejected application of the
3 *Trepanier* test, holding that a petitioner need only satisfy one of the types of standing set out
4 in RCW 36.70A.280(2).³ In both *Achen v. Clark County*,⁴ and *Rasmussen v. Clark County*,⁵
5 the Western Board explicitly rejected application of the two-part *Trepanier* test. That
6 conclusion has been consistently maintained.⁶ Standing to raise a SEPA claim related to the
7 adoption of comprehensive plans and development regulations, or amendments of same,
8 before the GMHB is based on RCW 36.70A.280 which sets forth the jurisdiction of the
9 Board and also clarifies who may file a petition for review:

11 (1) The growth management hearings board shall hear and determine only
12 those petitions alleging either:

13 (a) That, except as provided otherwise by this subsection, a state agency,
14 county, or city planning under this chapter is not in compliance with the
15 requirements of this chapter, chapter 90.58 RCW as it relates to the adoption
16 of shoreline master programs or amendments thereto, or chapter 43.21C RCW
17 as it relates to plans, development regulations, or amendments, adopted under
RCW 36.70A.040 or chapter 90.58 RCW. . . . ; RCW 36.70A.280(1)(a).

18 (2) A petition may be filed only by: (a) The state, or a county or city that plans
19 under this chapter; (b) a person who has participated orally or in writing before
20 the county or city regarding the matter on which a review is being requested;
21 (c) a person who is certified by the governor within sixty days of filing the
22 request with the board; or (d) a person qualified pursuant to RCW 34.05.530.
RCW 36.70A.280(2).

23 Thus, this Board has jurisdiction to hear petitions alleging noncompliance with SEPA “as it
24 relates to plans, development regulations, or amendments, adopted under RCW
25

27 ³ (2) A petition may be filed only by: (a) The state, or a county or city that plans under this chapter; (b) a person
28 who has participated orally or in writing before the county or city regarding the matter on which a review is
29 being requested; (c) a person who is certified by the governor within sixty days of filing the request with the
board; or (d) a person qualified pursuant to RCW 34.05.530.

30 ⁴ WWGMHB No. 95-2-0067c (Order on Motions, May 24, 1995).

31 ⁵ WWGMHB No. 95-2-0055 (Order on Motions, May 6, 1995).

32 ⁶ See *Island County Citizens’ Growth Management Coalition v. Island County*, No. 98-2-0023c (Order on
Motion to Dismiss, March 1, 1999); *WEAN v. Island County*, No. 03-2-0008 (Final Decision and Order, August
25, 2003) at 24-31.

1 36.70A.040 . . .” Those petitions may be brought by “a person who has participated orally or
2 in writing before the county or city regarding the matter on which a review is being
3 requested.” In the matter before the Board, some of the Petitioners “participated orally or in
4 writing.” They therefore have standing to raise the SEPA issue.

5 The City further argues that only four of the individual petitioners administratively
6 appealed the City’s issuance of the DNS, and that the other individuals, by not appealing
7 the DNS, failed to exhaust their administrative remedies. Since this Board’s decision in
8 *Heikkila v. City of Winlock*, this Board has required that a challenger of a SEPA decision
9 must exhaust available administrative remedies.⁷

11 [W]e hereby overrule the prior holding of the Western Board in regards to the
12 need to exhaust administrative remedies prior to seeking a review of a SEPA
13 decision before the Board.

14 The record discloses that the "Olympians" were the named appellant of the DNS. See AR
15 402. Also, the 4 individual members all identified themselves as members of the
16 "Olympians," Judith A. Bardin, John C. Tobin, Walter R. Jorgensen and Eric Swanstrom
17 appealed the DNS determination before the City’s Hearing Examiner.⁸ AR 403-406.
18 Consequently, the Board finds that Olympians and the 4 members all have standing as to
19 Issue 1, the SEPA issue. The City’s Motion to Dismiss shall be **denied**.

22 PETITIONERS’ MOTION FOR SUMMARY JUDGMENT

23 The Petitioners have moved for summary judgment, a dispositive motion under WAC
24 242-03-555. Although the Board does not often entertain such motions, they are appropriate
25 when, based on a limited record, they do not involve disputed facts and turn primarily on
26 questions of law.⁹ That appears to be the situation now before the Board. Although the
27 entire record in this matter is lengthy, the portion relevant to the SEPA Issue is limited. It
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30 ⁷ WWGMHB No. 09-2-0009c (Order on Dispositive Motions, May 29, 2009) at 7, See related consolidated
31 case WWGMHB No. 09-2-0013c (Order Granting Motion for Reconsideration, June 30, 2009).

32 ⁸ AR 402.

⁹ See *Twin Falls, Inc. v. Snohomish County*, CPSGMHB No. 93-3-0003 (Order on Dispositive Motion, June 11,
1993) at 17-18. *Reading, et al. v. Thurston County*, WWGMHB No. 94-2-0019 (Order on Dispositive Motions,
December 22, 1994).

1 further appears that there are no disputed facts and the question is one of law: whether the
2 consideration and adoption of the development regulations included in Ordinance 7160
3 should have been first informed by the preparation of an EIS or, alternatively, whether the
4 issuance of the Declaration of Nonsignificance (DNS) was based on adequate analysis.
5 Here, the challenge involves the DNS and, as this Board stated in *Reading*: “A procedural
6 challenge to State Environmental Policy Act (SEPA) compliance; particularly one involving a
7 DNS would lend itself to resolution by dispositive motion.”¹⁰
8

9 As previously noted, challenged Ordinance 7160 adopted development regulations
10 implementing the City’s 2014 comprehensive plan update which set forth policies which
11 would, when implemented, achieve higher residential densities. The City had published a
12 Supplemental Environmental Impact Statement (SEIS) in conjunction with its 2014
13 comprehensive plan update.¹¹ However, the City elected to issue a DNS in conjunction with
14 adoption of the implementing development regulations included in Ordinance 7160. The
15 essence of the Petitioners’ challenge is that RCW 43.21C.030 and WAC 365-196-620
16 mandated the preparation of an EIS prior to consideration of what became Ordinance
17 7160.¹²
18

19 The DNS¹³ followed and referenced a WAC 197-11-235 SEPA Checklist
20 (Checklist).¹⁴ The Petitioners argue that the Checklist provided inadequate information
21 regarding the impacts of the Ordinance and that, based on many of the responses on the
22 Checklist, the City appears to have assumed that as a “non-project action,” impacts would
23 be properly addressed at a later date. By way of example, the City’s responses to some of
24 the questions posed by the Checklist included “Does not apply as this is a non-project
25 action”; “None – this is a non-project action. Potential noise impacts may occur during future
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29 ¹⁰ *Reading* at 3.

30 ¹¹ AR 2.

31 ¹² AR 635, Ordinance 7160, page 1, states that it is designed “to implement policy direction in the City of
32 Olympia Comprehensive Plan to adopt zoning that allows a wide variety of housing types and densities so that
housing can be available in a broad range of costs . . .”

¹³ AR 328.

¹⁴ AR 322.

1 development proposals, and will be addressed through City regulations and/or specific
2 environmental review”; “Does not apply as this is a non-project proposal. Any future
3 residential development would be subject to city, state and federal regulation”¹⁵

4 The Petitioners contend that many of the impacts could have been addressed as the
5 City had much more specific impact information available in 2018 than it had when it issued
6 its 2014 SEIS. The Petitioners summarize their argument with the following statement: “By
7 failing to provide environmental analysis of the development regulations, the DNS and its
8 associated Checklist deprived the City Council of an opportunity to assess the impacts of
9 the project. Contrary to the Checklist’s assertions, this non-project action is not exempt from
10 environmental review.”¹⁶ While WAC 197-11-442(2) allows more flexibility when considering
11 non-project actions, that does not allow avoidance of environmental review merely because
12 there are no specific proposals under consideration.¹⁷

13
14 Non-project actions are not exempt from adequate SEPA review.¹⁸ In fact,
15 jurisdictions may not evade SEPA review by deferring analysis until later stages of actual
16 development.¹⁹ This Board has often considered SEPA requirements in regards to non-
17 project actions.

18
19 Thus, when a city amends its Comprehensive Plan or changes zoning, a detailed
20 and comprehensive SEPA environmental review is required. SEPA is to function “as
21 an environmental full disclosure law,” and the City must demonstrate environmental
22 impacts were considered in a manner sufficient to show “compliance with the
23 procedural requirements of SEPA.”²⁰

24 The City correctly points out that its determination is entitled to deference under RCW
25 43.21C.090. However, it is also incumbent upon the City to establish a showing that
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28 ¹⁵ AR 322.

29 ¹⁶ Olympians’ MSJ at 10.

30 ¹⁷ In re *King County v. Boundary Review Board*, 122 Wn.2d 648, 664 (1993).

31 ¹⁸ WAC 197-11-055(2)(a)(i): The fact that proposals may require future agency approvals or environmental
32 review shall not preclude current consideration, as long as proposed future activities are specific enough to
allow some evaluation of their probable environmental impacts.

¹⁹ *Alpine Lakes Protection Society v. DNR*, 102 Wn. App. 1, 16 (1999).

²⁰ *Association of Citizens Concerned About Chambers Lake Basin, et al. v. City of Olympia*, GMHB No. 13-2-
0014 (Final Decision and Order, August 7, 2013) at 15.

1 “environmental factors were considered in a manner sufficient to amount to *prima facie*
2 compliance with the procedural requirements of SEPA.”²¹

3 As the Petitioners observe,²² the Board has long held that the impacts that must be
4 considered for a non-project action are the impacts that are allowed by virtue of the change
5 in designation itself. While project level impacts may properly be deferred to the permitting
6 stage, the [jurisdiction] must evaluate the impacts allowed under the changed
7 designation at the time of that non-project action.²³ If the impacts are not merely
8 hypothetical but can be known or are reasonably foreseeable, it is incumbent upon the
9 jurisdiction to develop and consider such information.²⁴

11 Here, the potential impacts are not hypothetical. The development regulations
12 included in the challenged ordinance are designed to increase residential types and
13 densities primarily within two residential zones, R 4-8 and R 6-12.²⁵ The amended
14 regulations include, but are not limited to, increased size limits for accessory dwelling units
15 (ADU), removal of a requirement that ADU owners live onsite and elimination of ADU
16 parking requirements,²⁶ expanded density bonuses for “cottage housing,”²⁷ and authorized
17 triplexes and fourplexes.²⁸

19 Questions were raised by members of the Olympians regarding the lack of, or
20 inadequacy of, information provided by the City’s Checklist. One observation was that the
21 Checklist relied on a memorandum from the Thurston Regional Planning Council²⁹ which
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24 ²¹ *Chuckanut Conservancy v. Washington State Dept. of Natural Resources*, 156 Wn. App. 274, 286 – 87
25 (2010); *Juanita Bay Valley Cmty. Ass’n v. City of Kirkland*, 9 Wn. App. 59, 73 (1973).

26 ²² Olympians’ MSJ at 13.

27 ²³ *WEAN v. Island County*, GMHB No. 03-2-0008 (Final Decision and Order, August 25, 2003) at 39, “The
28 impacts that must be considered for this non-project action are the impacts that are allowed by virtue of the
29 change in designation itself. While project level impacts may properly be deferred to the permitting stage, the
30 County must evaluate the impacts allowed under the changed designation at the time of that non-project
31 action.”

32 ²⁴ A SEPA determination is a “detailed statement” of impacts, effects, alternatives, and resources created by
an action the SEPA determination is evaluating”. RCW 43.21C.030(2)(c).

²⁵ AR 322 at 3.

²⁶ *Id.* at 16 and 173.

²⁷ *Id.* at 23 and 58.

²⁸ *Id.* at 50.

²⁹ Attachment 3 to SEPA Checklist.

1 included a qualifier.³⁰ Another commenter, a civil engineer, noted that the effect of the
2 proposal on zoning densities is unknown and that there had been no analysis of resulting
3 long term densities.³¹ He also observed that the transportation impacts received short shrift:
4 The estimated generated traffic increases were divided by the City's total mileage as
5 opposed to focusing on traffic impacts to the affected areas of the City.³² He also suggested
6 that the Checklist failed to take into consideration the demographic shifts resulting from the
7 regulations which would likely have impacts on school populations.³³
8

9 Among other concerns raised were impacts on vehicle parking as ADUs would be
10 allowed but parking requirements for them would be eliminated. Parking issues would be
11 compounded if a garage was converted to an ADU.³⁴ Potential increases in impervious
12 surface and surface water run-off were addressed as well.³⁵
13

14 As the Checklist indicates, the action could increase residential unit capacity by as
15 much as 948-1,892 city-wide over the next twenty years.³⁶ While additional vehicular trips
16 generated by the Ordinance are discussed,³⁷ the Checklist fails to adequately address
17 possible impacts on transportation infrastructure. For example, in response to the Checklist
18 question regarding the possible need for new or improved roads, streets, pedestrian or
19 bicycle facilities, the Checklist repeats a common refrain: "No, as this is a non-project action.
20 *Future residential* development would be subject to city requirements and/or a project-level
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24 ³⁰ Attachment 3 to SEPA Checklist, p.2:

25 This analysis focused on proposed changes to the R-4-8 and R-6-12 zones (Figure 1)
26 however the city is considering changes to other zones. Those changes were not modeled in
27 this analysis because they would allow additional uses that would provide no additional
28 capacity. In addition, while the proposed changes would affect regulations for accessory
29 dwelling units, ADUs are not included in the analysis's residential capacity estimates. The
30 model also does not explicitly address internal conversions of existing residence into
31 multifamily units.
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31 AR 342 at 3.

32 *Id.* at 4.

33 *Id.*

34 AR 345 at 6.

35 *Id.* at 7, 8.

36 AR 322 at 17.

37 *Id.*

1 environmental review.”³⁸ As to possible impacts on public services including fire and police
2 protection, the Checklist merely iterates the data regarding the number of additional
3 residential units that could be generated.³⁹

4 Another example is the response on the Checklist to a question related to possible
5 impacts on utilities such as water, sewer, and refuse service: “Does not apply, as this is a
6 non-project action.”⁴⁰ Similarly, the response to a question about potential stormwater runoff
7 was “None – this is a non-project action.”⁴¹ The response to a question regarding the
8 number of people anticipated to be displaced was again that this is a nonproject action and
9 then added reference to the Thurston Regional Planning Council (TRPC) analysis which
10 was based on the number of displacements over a 16 year period prior to the
11 implementation of the challenged ordinance.⁴² Similar responses were given to questions on
12 46 topics,⁴³ including transportation impacts,⁴⁴ parking,⁴⁵ and generated vehicle trips.⁴⁶

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14
15 It is noteworthy that the City actually addressed some of the possible impacts of this
16 proposal in the 2014 SEIS completed when the pertinent goals and policies were adopted,
17 albeit in a generalized fashion no doubt due to the fact that the Comprehensive Plan
18 amendments constituted mere policy guidance.⁴⁷ It is also significant that the 2014 SEIS
19 contemplated additional review:

20 Because this Plan is as a "high level" and specific impacts cannot be
21 predicted, most analysis is in a qualitative rather than a quantitative form.
22 Further environmental review would be conducted when implementing
23 measures, such as regulations, more detailed plans, or specific construction
24 activities are proposed. The level of detail of subsequent review will vary
25 based upon the specific provisions of those later proposals.⁴⁸ (emphasis
26 added).

27 ³⁸ *Id.*

28 ³⁹ *Id.* at 18.

29 ⁴⁰ *Id.*

30 ⁴¹ *Id.* at 7.

31 ⁴² *Id.* at 13.

32 ⁴³ Petitioner’s Prehearing Brief at 2.

⁴⁴ *Id.* at 16.

⁴⁵ *Id.* at 17.

⁴⁶ *Id.*

⁴⁷ AR 2.

⁴⁸ *Id.* at 7.

1 When specific development regulations were proposed which led to the passage of
2 Ordinance 7160, additional quantitative analysis should have been conducted. That is true
3 particularly in light of the probable future lack of overall analysis due to the fact that resulting
4 density increases will be incremental and would be unlikely to trigger such analysis.⁴⁹ The
5 incremental changes resulting from implementation of Ordinance 7160 may be insignificant,
6 but the cumulative effect on the environment may well be profound.
7

8 It is imperative that for non-project actions, including the adoption of significant
9 zoning changes, jurisdictions address the probable impacts of future authorized project
10 actions.⁵⁰ "An agency may not postpone environmental analysis to a later implementation
11 stage if the proposal would affect the environment without subsequent implementing
12 action."⁵¹ Here, it is apparent that the City's decision was made without full consideration of
13 the possible environmental consequences.
14

15 It is apparent that information was available and/or could have been developed that
16 would have provided much greater specificity regarding the impacts of Ordinance 7160, but
17 the Checklist fails to provide that information and the decision makers were thus prevented
18 from receiving the required "environmental full disclosure."⁵² Based on a thorough review of
19 the DNS and accompanying Checklist, **the Board finds and concludes** that the City of
20 Olympia failed to establish *prima facie* compliance.
21

22 The Board is left with the firm and definite conviction that a mistake has been made
23 as a result of the City of Olympia's issuance of a Declaration of Nonsignificance based on a
24 Checklist which failed to adequately address the environmental impacts of the proposed
25 action and failed to adequately address the unavoidable environmental effects. **The Board**
26

27 ⁴⁹ Applications for development permits for ADUs, duplexes, townhomes and comparable development
28 authorized by Ordinance 7160 would not result in a broad-based analysis of impacts.

29 ⁵⁰ *Spokane County v. E. Wash. Growth Mgmt. Hearings Bd.*, 176 Wn. App. 555, 579, (2013).

30 ⁵¹ *Id.* citing RICHARD L. SETTLE, THE WASHINGTON STATE ENVIRONMENTAL POLICY ACT § 13.01[1], at 13-15 to -16
(1987 & Supp. 2010); see WAC 197-11-060(5)(d)(i)-(ii).

31 ⁵² The function of SEPA determinations is to have "environmental considerations become part of normal
32 decision making." *Loveless v. Yantis*, 82 Wn.2d 754, 765, (1973). [SEPA determinations are to] provide
consideration of environmental factors . . . to allow decisions to be based on complete disclosure of
environmental consequences. *King County v. Boundary Review Board*, 122 Wn.2d 648, 663, (1993).

1 **concludes** that the City's action violated RCW 43.21C.030 by basing its issuance of a DNS
2 on an inadequate Checklist.

3 4 **INVALIDITY**

5 Accompanying Olympians' motion for summary judgment is their plea that the Board
6 issue an order invalidating Ordinance 7160 for failure to comply with SEPA.⁵³

7 RCW 36.70A.302(1) provides:

8 A board may determine that part or all of a comprehensive plan or development
9 regulation are invalid if the board:

10 (a) Makes a finding of noncompliance and issues an order of remand under RCW
11 36.70A.300;

12 (b) Includes in the final order a determination, supported by findings of fact and
13 conclusions of law, that the continued validity of part or parts of the plan or
14 regulation would substantially interfere with the fulfillment of the goals of this
chapter, and

15 (c) Specifies in the final order the particular part or parts of the plan or regulation that
16 are determined to be invalid, and the reasons for their invalidity.

17 SEPA challenges address the legal adequacy of the environmental impact statement
18 (EIS) or environmental checklist supporting a determination of non-significance (DNS) and
19 the actions taken in reliance on such an environmental document, typically the enactment of
20 an ordinance.⁵⁴ Generally, the Board has invalidated SEPA-noncompliant ordinances for
21 noncompliance with other requirements of the GMA.⁵⁵ The Board compared *Kittitas County*
22 *Conservation*,⁵⁶ finding GMA and SEPA planning procedures would be rendered ineffectual
23 and moot if project vesting were to occur despite non-compliant environmental review, with
24 *Davidson Serles & Assocs.*,⁵⁷ finding that a serious SEPA deficiency had not persuaded the
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27 ⁵³ Olympians' MSJ at 16.

28 ⁵⁴ RCW 43.21C.075(6)(c) reads, "Judicial review under this chapter shall without exception be of the
governmental action together with its accompanying environmental determinations."

29 ⁵⁵ See, e.g., *Cascade Bicycle Club v. City of Lake Forest Park*, CPSGMHB No. 07-3-0010c (Final Decision
30 and Order, July 23, 2007); *MBA/Camwest v. City of Sammamish*, CPSGMHB No. 05-3-0027 (Final Decision
and Order, August 4, 2005).

31 ⁵⁶ *Kittitas County Conservation v. Kittitas County*, No. 11-1-0001 (Corrected Final Decision and Order
32 (Partial), June 13, 2011), at 11-12, *aff'd Kittitas County v. Kittitas County Conservation Coalition*, 176 Wn. App.
38, 308 P.3d 745 (2013).

⁵⁷ *Davidson Serles & Assocs. v. City of Kirkland*, 159 Wn. App. 616, 632 n.8 (2011).

1 Board that a GMA goal would be thwarted absent a ruling of invalidity, and noted that “[n]on-
2 compliance with SEPA does not automatically equate to frustration of the GMA goal for
3 protection of the environment.”⁵⁸

4 Nonetheless, the Supreme Court refers to SEPA as an environmental full disclosure
5 law that requires agencies to identify, analyze, disclose, and consider mitigation of impacts
6 on both the natural and built environments resulting from a proposed action. In *King County*
7 *v. Washington State Boundary Review Board for King County*, the Supreme Court
8 recognized the purpose of SEPA is “to provide consideration of environmental factors at the
9 earliest possible stage to allow decisions to be based on complete disclosure of
10 environmental consequences,”⁵⁹ and is expected to provide agencies environmental
11 information *prior to making decisions, not after they are made*.⁶⁰

12 More recently, in *Blair*, the Board invalidated an action based solely on a failure to
13 comply with SEPA. However, in that case, the Board entered extensive findings explaining
14 how a defective EIS had not provided decision-makers with necessary information on which
15 to base their action by failing to consider appropriate alternatives, particularly where the EIS
16 had failed to assess impacts on environmental values and flood/landslide hazards.⁶¹
17 Although the Supreme Court has held that where a DNS is a legal prerequisite of an agency
18 action such that the legality of the local action is qualified by the propriety of the DNS,⁶² the
19 Board has yet to invalidate an action based solely on an inadequate DNS absent additional
20 facts showing that continued validity of the action will substantially interfere with GMA goals
21 as required by RCW 36.70A.302.
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25 In view of the aforementioned, the Board declines to impose invalidity without
26 additional briefing. The Board’s decision on the continued validity of Ordinance 7160 is
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29 ⁵⁸ *Blair, et al. v. City of Monroe*, GMHB No. 14-3-0006 (Order Nunc Pro Tunc, September 19, 2014) at 31.

30 ⁵⁹ *King County v. Washington State Boundary Review Board for King County*, 122 Wn.2d 648, 664, 860 P.2d
31 1024 (1993). See also, *Lasilla v. Wenatchee*, 89 Wn.2d 804 (1978).

32 ⁶⁰ *Id.*

⁶¹ *Blair, et al. v. City of Monroe*, GMHB No. 14-3-0006 (Order Nunc Pro Tunc, September 19, 2014) at 31-33.

⁶² *State ex rel. Friend & Rikalo Contractor v. Grays Harbor County*, 122 Wn.2d 244, 256, 857 P.2d 1039
(1993)

1 **deferred** until its final decision and order.

2
3 **PETITIONER'S MOTION TO SUPPLEMENT**

4 The Board's statutory mandate is to hear and decide whether a jurisdiction's
5 legislative action complies with the Growth Management Act (GMA), State Environmental
6 Policy Act or the Shoreline Management Act (SMA) on the basis of the record developed by
7 the city, county, or state. RCW 36.70A.290(4).

8 The index of the record should list "all material used in taking the action which is the
9 subject of the petition for review, including materials submitted in public comment." WAC
10 242-03-510(1). The Board may supplement the record if evidence not included in the record
11 is necessary or may be of substantial assistance to the board in reaching its decision. RCW
12 36.70A.290(4)

13
14 A motion to supplement the record shall identify the evidence requested to be
15 considered and state the reasons why such evidence would be necessary or of substantial
16 assistance to the board in reaching its decision. WAC 242-03-565(1). Evidence arising
17 subsequent to adoption of the challenged legislation is rarely allowed except when
18 supported by a motion to supplement showing the necessity of such evidence to the board's
19 decision concerning invalidity. WAC 242-03-565(2).

20
21 The burden is on the moving party to demonstrate the evidence they wish to add is
22 necessary or of substantial assistance to the Board. To satisfy this burden, the moving party
23 should explain what is in the evidence that makes it relevant and why consideration would
24 be helpful to the Board. Generally speaking, the Board errs on the side of inclusion rather
25 than exclusion with exhibits existing prior to adoption.

26
27 The presiding officer has the authority to regulate the course of the case, ruling on all
28 evidentiary matters, including supplementation of the record. WAC 242-03-530(5).

1 Discussion

2 The Petitioners have moved to supplement the record with seventeen documents,
3 the first three of which are plans which have been adopted by the City:

- 4 • City of Olympia, Storm and Surface Water Plan, adopted April 2018.⁶³
- 5 • City of Olympia, 2016 Drainage Design and Erosion Control Manual.⁶⁴
- 6 • City of Olympia, Appendix 1 - 2016 Drainage Design and Erosion Control
- 7 Manual.⁶⁵
- 8
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10 The City objects that these materials were not considered during the legislative
11 process leading up to Ordinance 7160. Pursuant to WAC 242-03-630(4), the Board takes
12 **official notice** of these plans.

13 Petitioners ask to admit the City's Sea Level Rise Response Plan,⁶⁶ still undergoing
14 SEPA review,⁶⁷ which Petitioners assert explains the interplay between the sewage
15 treatment facility and sea level rise. Unexplained is the relevance of that information to the
16 Board's decision here. Supplementation is **denied**.

17
18 The next four documents⁶⁸ pertain to historic properties and the history of single-
19 family development in Olympia. Petitioners assert these are needed for "context" regarding
20 development in Olympia but do not how explain how such context will aid the Board in
21 deciding whether Ordinance 7160 complies with the GMA. Supplementation is **denied**.

22 Petitioners move to admit two documents⁶⁹ pertaining to the City's planning for
23 maintaining habit and wetlands, arguing that Ordinance 7160 may reduce both. Petitioners
24 do not explain why these documents will assist the Board in deciding this case. They simply
25

26
27 ⁶³ Olympians' MTS at 2.

28 ⁶⁴ Olympians' MTS at 3.

29 ⁶⁵ Olympians' MTS at 3.

30 ⁶⁶ Olympians' MTS at 3-4.

31 ⁶⁷ Response to MTS at 5.

32 ⁶⁸ Olympians' MTS at 4-5: Thurston County Historic Properties Map; City of Olympia Historic Preservation Action Plan; City of Olympia Single-family Residential Development in Olympia, WA Up to 1975; City of Olympia Mid-Century Context Statement.

⁶⁹ Olympians' MTS at 6-7. The City of Olympia's 2013 Habitat and Stewardship Strategy and the Thurston County Wetland and 300-foot Wetland Buffer Map.

1 copy the executive summary from the habitat strategy and show where critical areas are on
2 a map. Neither is an explanation of how habitat or wetlands will be impacted by the
3 challenged action. Petitioners **may present** these documents, but the Board will reserve
4 judgment as to whether such argument will be of substantial assistance.

5 Next Petitioners ask for three documents⁷⁰ pertaining to sidewalks, including a
6 screenshot showing locations. Petitioners' argument that "streets need sidewalks" does not
7 suffice to explain how these materials will be of substantial assistance to the Board.
8
9 Supplementation is **denied**.

10 Petitioners assert that a document⁷¹ prepared by staff for the Planning Commission⁷²
11 is relevant to the feasibility of development around neighborhood centers. Petitioners **may**
12 **present** these documents, but the Board again will reserve judgment as to whether such
13 argument will be of substantial assistance.

14 Petitioners argue that a Memorandum of Understanding (MOU) between the
15 Coalition of Neighborhood Associations and the City, effective from 2015-2018, will be of
16 substantial assistance to the Board in evaluating the Petitioners' public participation
17 claims.⁷³ The City responds that the MOU was superseded by a new MOU in 2018.
18
19 Supplementation is **denied**.

20 Petitioners request that an email from Sheena Peitzold to the Olympia City Council,
21 dated June 3, 2018, be admitted to the record. This email is already in the Record.⁷⁴
22 Finally, Petitioners seek to admit an audio recording of the August 21, 2018, City Council
23 Meeting. It would be incumbent upon the Olympians to prepare a transcript and the City will
24
25
26
27

28 ⁷⁰ Olympians' MTS at 7-8. City of Olympia Sidewalks Construction Website; City of Olympia, Sidewalk
29 Program (2003), and a screenshot labeled Olympia Data02.

30 ⁷¹ Olympians MTS at 9 City of Olympia Summary of Findings about Olympia's Neighborhood Centers.

31 ⁷² City Response to Motion to Supplement at 8.

32 ⁷³ Olympians' MTS at 9-10 "The CNA Memorandum of Understanding (MOU) was first developed in 2012 and
has been updated twice, most recently in December 2018.... The CNA MOU will be of substantial assistance
to the Board in evaluating the petitioners' public participation claims."

⁷⁴ Olympians' MTS at 10. See also City Response to Motion to Supplement at 8 and Record at AR 480 –
000016 to AR 480 – 000017.

1 be allowed to challenge the accuracy of same. Subject to subsequent verification of
2 accuracy, the Board will **admit** the record.

3 4 ORDER

5 Based on review of the SEPA Issue, Issue 1 in the Petition for Review, the briefs
6 submitted by the parties, and having deliberated on the matter, the Board orders as follows:
7

8 1. The City of Olympia's Motion to Dismiss is **denied**;

9
10 2. The Olympians' Motion for Summary Judgment is **granted**.

11
12 3. Consideration of the request for invalidity is **deferred**;

13
14 4. The Olympians' Motion to Supplement is granted in part and denied in part, as
15 reflected in the table below;
16

17 Proposed Exhibit	Order	Exhibit #
18 City of Olympia, Storm and Surface Water Plan, April 2016	Official Notice	MI 51
19 City of Olympia, 2016 Drainage Design and Erosion Control	Official Notice	AR 894
20 Manual.		
21 City of Olympia, Appendix 1 - 2016 Drainage Design and	Official Notice	AR 895
22 Erosion Control Manual.		
23 City of Olympia, Sea Level Rise Response Plan (SLRP).	Denied	NA
24 Thurston Regional Planning Council and City of Olympia,	Denied	NA
25 Thurston County Historic Properties Map.		
26 City of Olympia, Historic Preservation Action Plan.	Denied	NA
27 City of Olympia, Single-family Residential Development in	Denied	NA
28 Olympia, WA Up to 1975.		
29 City of Olympia, Mid-century Context Statement.	Denied	NA
30 City of Olympia, 2013 Habitat and Stewardship Strategy.	May Present	AR 896
31 Thurston County, Thurston County Wetland and 300-foot	May Present	AR 897
32 Wetland Buffer Map.		

1	City of Olympia, Sidewalks Construction Website.	Denied	NA
2	City of Olympia, Sidewalk Program	Denied	NA
3	City of Olympia, Olympia Data02	Denied	NA
4	Summary of Findings about Olympia's Neighborhood Centers.	May present	AR 898
5			
6	City of Olympia, CNA-and-City MOU 2015-2018-1.	Denied	NA
7	Email from Sheena Peitzold to City of Olympia City Council, June 3, 2018.	Already in Record	AR 480
8			
9	City of Olympia, Transcription of Audio of City Council Meeting, Aug. 21, 2018.	Admitted provisionally	AR 899
10			

11

12 DATED this 29th day of March 2019.

13

14 _____
William Roehl, Board Member

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17 _____
Nina Carter, Board Member

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Cheryl Pflug, Board Member

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APPENDIX A

Motions filed February 25, 2019:

- Olympians' Motion to Supplement the Record (Olympians' MTS);
- Olympians' Motion for Summary Judgment (Olympians' MSJ);
- City of Olympia's Motion to Dismiss SEPA Claims (City's MTD).

Responses were filed on March 6, 2019 as follows:

- City of Olympia's Response to Motion to Supplement (Response to MTS);
- City of Olympia's Response to Motion for Summary Judgment (Response to MSJ);
- Olympians' Response to Motion to Dismiss SEPA Claims (Response to MTD).